

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: July 11, 2001

Case No.: **2001-INA-38**
CO No.: **P1998-NY-02354054**

In the Matter of:

WIDER CONSOLIDATED INC.
Employer

on behalf of

JULIETA NANEZ
Alien

Certifying Officer: Dolores Dehaan
New York, New York

Appearance: Elihu S. Massel, Esquire
New York, New York

Before: Vittone, Burke and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

Statement of the Case

On December 31, 1996, Wider Consolidated, Inc. ("Employer") filed an *Application for Alien Employment Certification* (ETA 750) to permit the employment of Julieta Nanez ("the Alien") as an Import-Export Manager. (AF 1-5). The duties were described as follows:

Employee will be in charge of the preparation and documentation of shipments in international commerce. Negotiates tariffs [*sic*], contracts with truckers and international carriers for the movement of goods. Assures all documentation complies with export and import rules. Supervise document clerks.

(AF 5).

The New York State Department of Labor ("NYDOL") informed the Employer on March 13, 2000 that a thirty day recruitment period had been established from March 14, 2000 to April 12, 2000 and that a forty-five day documentation period had been established from April 13, 2000 to May 29, 2000. The Employer was instructed to proceed with advertising the position and to thereafter file a written recruitment report by the end of the documentation period which was to include the following:

- the advertisement tearsheet for each day the ad ran;
- the original posting with an original statement signed and dated by the company's hiring authority documenting the dates and the results of posting;
- an original statement signed and dated by the company's hiring authority identifying all recruitment sources by name; state the number of US workers who responded;
- the names and addresses of all applicants including the specific job-related reasons for any rejection;
- the names of those who were interviewed and the name and job title of the person who did the interviewing;
- documentation of the employer's attempt to contact each applicant which should include proof of telephone calls such as a telephone log from the telephone company, copies of certified mail receipts and the return receipt with an official stamp from the post office, plus a copy of the letter sent; and
- the original copy of all resumes received.

(AF 53-54). The Employer was urged to conduct recruitment and submit results promptly. *Id.*

Advertisements for the position appeared in the *New York Times* on April 9, 10 & 11, 2000. A total of 23 resumes were received as a result. Seventeen were forwarded to the Employer by the State agency on April 18, 2000. (AF 61). One was sent on April 19 and the remaining five, *i.e.*, those of E Quijano, C. Murphey, T. Kolowski, E. Reyes and C. Catania, were sent on May 5, 2000. (AF 59, 62). The Employer was reminded in each instance that a

recruitment report was due by May 29, 2000 and that it was to include the aforementioned items.

On May 20, 2000, counsel for the Employer requested an extension of the time for filing the recruitment report “in as much as 5 additional resumes were only received today.” He was informed “There are no extensions to the documentation period.” (AF 64). Under the date of June 19, 2000 counsel for the Employer forwarded “the results of the recruitment,” which consisted of resumes and cover letters with notations as to why applicants were rejected. (AF 65-100). No narrative report was submitted documenting when and how any interviews were conducted. Receipts were forwarded showing that certified mail was sent to applicant June Lui on May 6, 2000 and A. Marrero on May 18, 2000. Copies of the mail were not submitted. No documentation of any attempt to contact applicants by phone was submitted. No posting documentation was submitted. *Id.* The State agency reported that only 17 of the 23 resumes were returned and that the resumes of applicants Murphey, Kolosky, Maekwa, Hallegua, Kaplan and Sehgal were missing. (AF 101-02).

On August 7, 2000, the CO issued a Notice of Findings (“NOF”) proposing to deny the application on the basis, *inter alia*, that the Employer had failed to furnish a recruitment report regarding T. Kozlowski and had failed to return his resume of which was sent to it on May 5, 2000. (AF 108-11).

The Employer’s rebuttal, submitted on September 20, 2000, stated in regard to Ted Kozlowski that he had been scheduled for an interview on three different dates but failed to appear.¹ His resume was not submitted nor was any documentation of the reported attempts to contact him. (AF 113-17).

On September 27, 2000, the CO issued her Final Determination (“FD”) denying the application. (AF 118-19). The CO concluded that the Employer had not satisfactorily documented why Mr. Kozlowski was rejected at the time of the initial referral nor had it returned his resume. (AF 118).

The Employer requested a review of the denial of its application and the record has been submitted to the Board for such action.

Discussion

Section 656.21(b)(6) of the regulations, 20 C.F.R. §656.21(b)(6) provides that “[i]f U.S. workers have applied for the job opportunity, the employer shall document that they have been rejected solely for lawful job-related reasons.” The Board has held repeatedly that although the regulations do not explicitly state a “good faith” requirement in regard to post-filing recruitment,

¹The date(s) of these purported appointments for T. Kozlowski were not stated. Another applicant, whose rejection the CO had questioned, was said to have been scheduled for an interview on August 30, 2000 and the Employer has acknowledged in its brief that Kozlowski’s interview was scheduled after the issuance of the NOF.

such a good faith requirement is implicit. *See, e.g. H.C. LaMarche Enterprises, Inc.* 1987-INA-607 (Oct 27, 1988). Thus, it has been held that an employer must make efforts to contact qualified U.S. applicants in a timely manner after receipt of resumes from the state agency and that its failure to do so indicates a failure to recruit in good faith. *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991)(*en banc*).

Section 656.21(j) of the regulations requires that an employer provide the local office with a written report of all the employer's post application recruitment efforts during the 30 day recruitment period. The report must state the names, addresses, and provide resumes of the U.S. workers interviewed and the job title of the person who interviewed each worker. The Board has held that certification is properly denied when an employer fails to comply with these requirements. *County of San Diego, Department of General Serv.*, 1992-INA-19 (Jan. 26, 1993).

In the instant case, the Employer reportedly failed to furnish a recruitment report or resume concerning several applicants, including Ted Kozlowski, at the time they were due, and it does not contend otherwise. It has failed to furnish the resume even after being told of the necessity to do so in the NOF. It has failed to document that it ever attempted to interview him during the recruitment period. Any purported attempt to do so after the issuance of the NOF, and months after the recruitment period, of course, comes too late. Based on these facts alone, the application for certification must be denied.

We note that the CO assigned additional reasons for denying the application in the NOF and Final Determination. We do not deem it necessary to take up these issues.

ORDER

The Certifying Officer's denial of labor certification is hereby upheld.

Entered at the direction of the panel:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not

avored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.